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No. 42

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.
(No. 687, October Term, 1960.)

PHIL CAMPBELL, Commissioner of Agriculture of the State of Georgia, and GEORGIA FARM BUREAU FEDERATION, INC., Intervenor,
Appellants,
v.
WILLIAM HUSSEY, JR., AULBERT J. BRANNEN, SR., AULBERT J. BRANNEN, JR., ROBERT B. BRANNEN, GEORGE C. SUGG, ED WIGGINS, GUY SUTTON, SR., MRS. L. B. WILLOUGHBY,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Swainsboro Division.

MOTION FOR REHEARING.

EUGENE COOK,
The Attorney General,
State Judicial Building,
Atlanta 3, Georgia,
G. HUGHEL HARRISON,
Assistant Attorney General,
State Judicial Building,
Atlanta 3, Georgia,
GORDON KNOX,
Deputy Assistant Attorney General,
Hazlehurst, Georgia,
FRANK S. TWITTY,
Deputy Assistant Attorney General,
Camilla, Georgia,
CHRIS B. CONYERS,
Deputy Assistant Attorney General,
First National Bank of Brunswick Building,
Brunswick, Georgia,
Counsel for Phil Campbell, Commissioner of Agriculture of the State of Georgia,
DENMARK GROOVER, JR.,
Attorney at Law,
710 Walnut Street Building,
Macon, Georgia,
Counsel for Intervenor, Georgia Farm Bureau Federation, Appellants.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Swainsboro Division.

MOTION FOR REHEARING.

The Appellants herewith submit their Motion for Rehearing based on the following grounds:

1. The court overlooked the material contention of appellants that appellees did not have standing to raise the constitutional question.

2. **The decision as stated in the majority opinion is basically erroneous.**

3. **Even if 1 and 2 are without substance, appellants require a clarification and limitation of the judgment below which is affirmed by order of this court.**

ARGUMENT AND SUPPORT.

1. The court overlooked the material contention of appellants that appellees did not have standing to raise the constitutional question.

We call to the Court's attention that one of the questions argued in the Brief and upon oral argument was whether or not Appellees had standing to raise the constitutional issue, since, as appears from the record, no one was before the Court whose rights were derivative of and dependent upon the Federal Statute, the existence of which, it was contended, deprived the State of Georgia from legislating as it did.

In the closing portion of Appellants' Brief, the attention of the Court was called to the decision of **United States v. Raines**, 362 U. S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519, which opinion renewed basic positions of this Court on when and to what extent constitutional questions would be determined. In view of our contention that the majority opinion is erroneous and in view of our request for clarification, should that opinion be adhered to, we do no more than call the Court's attention to the fact that this question has not been determined.

2. The decision as stated in the majority opinion is basically erroneous.

The judgment of this Court is an unconditional affirmance of the judgment of the Court below. That judgment, in addition to enjoining the enforcement of the particular Act in question, also prevents the State of Georgia from taking **any** action relative to the identification of tobacco, whether or not "typed" as provided in, and whether or not sold on a market which is "designated" and subject to, the Federal Tobacco Inspection Act. The judgment below provides:

". . . the defendants and their successors in office and all others acting in behalf of them or either of them are hereby perpetually and permanently enjoined and restrained . . . from enforcing, or attempting to enforce, by direct or indirect, or other means, on **any** tobacco market in Georgia, **any** method, plan or device which identifies or tends to identify tobacco offered for sale as to its geographical origin, or which, in **any** manner distinguishes or differentiates between tobacco having its origin in Georgia, Florida or Alabama on the one hand or in South Carolina or North Carolina on the other hand; and from making or requiring **any** distinction or differentiation on the tobacco markets between separate lots of tobacco by reason of **any geographic origin or place of growing.**" (Emphasis supplied.)

If this opinion is permitted to stand, it could (a) remove completely the police power of this State relative to agricultural products in general or (b) prohibit the State of Georgia from exercising its full police power relative to tobacco in particular.

The Court in the majority opinion determines at the outset that:

> "(It does not) have here the question whether Georgia's law conflicts with the Federal law." (First sentence, paragraph 11, of the Opinion.)

We start then with the position of the Court, through the majority, supported vigorously by the minority, that there is no conflict between the definition contained in the Georgia Statute as to "type" and the "official standard" of the United States concerning "type." But the Court determines the case on the question of "preemption" and concludes that Congress "in legislating concerning the **type** of tobacco sold at auction preempted the field and left no room for any supplementary state regulation con-

cerning those same **types.**" (Emphasis supplied.) (Majority Opinion, first full sentence on page 4.)

In support of that conclusion, the Court then proceeds to demonstrate the intention to preempt based upon congressional pronouncement by committee report and individual statements relative to the importance of "grade." And, insofar as the Court bolsters its decision by discussion or pronouncement concerning preemption, as opposed to conflict, the Court contents itself in relying on those pronouncements concerning **grade.**

In addition to those sections of the Federal Tobacco Inspection Act alluded to in the Opinion of the minority, we call to the Court's attention the following sections of that Act which not only do not support the conclusion of **intent** to preempt, but affirmatively demonstrate the **intent** of **Congress not to preempt.**

(1) Section 511d, the last sentence, reads: "Nothing contained in this chapter shall be construed to prevent transactions in tobacco at markets not designated by the Secretary or at designated markets where the Secretary has suspended the requirement of inspection or to authorize the Secretary to close any market." So, too, the Secretary at nondesignated markets may not "type," grade or label; may not establish "official standards"; and may not even close markets which have been designated.

(2) Section 511e, the last paragraph of which reads: "This section is intended merely to provide for the furnishing of services upon request of the owner or other person financially interested in tobacco to be sampled, inspected or weighed and **which shall not be construed otherwise.**" (Emphasis supplied.)

It is important to note that this is the section pursuant to which the Secretary is authorized to inspect in order to determine those things which Congress deemed important

to determine, and this section as indicated above is limited in its scope and as to its construction, and specifically requires and permits cooperation between Federal and State agencies.

(3) Section 511g of the Act is the section which provides for labeling. That section authorizes the Secretary by regulation to prescribe the form of certification which is referred to throughout the Act and this authority is limited to "the form in which such certification of **grade** shall be shown. . . ." (Emphasis supplied.) This section we deem to be of particular significance since it demonstrates that in the field of identification, which field is the area specially intended by the Georgia Act to be occupied, Congress concerned itself and contented itself only with identification as to **grade** and neither permitted nor required, for identification purposes, any limitation as to "type."

(4) Section 511i concerns itself with those things which Congress thought it was important to make criminal offenses, so as to add additional deterrent to those who would invade the prerogatives of the Federal Government, by making those invasions crimes. Congress limited its pronouncements in this field (and by implication permits where not limited) to the following:

(a) The use of the words "United States," "Government," "Federal," relating to the **grade** of tobacco;

(b) 511i (c) prohibits "a certificate or report stating the **type**, grade, size or condition or any lot of tobacco to be in accordance with the standards of the United States . . . **unless** such certificate states in prominent letters in its heading that it is not issued under the authority of the United States." (Emphasis supplied.) No clearer

declaration on the part of Congress could exist that another, including the State, may identify tobacco in such manner even according to type and even according to grade if it sees fit provided **only** that it is disclosed that such is not an "official standard" of the United States.

(c) 511i (e). The proviso reads: "Nothing herein shall operate to prevent the owner of tobacco from appealing or protesting in accordance with regulations of the Secretary the grade certified for his tobacco." If the certification as to type was deemed by Congress to be important enough to be exclusive, and to preempt, would Congress preclude an appeal to the Secretary concerning "type"?

(d) 511i (g). This section makes it a crime only to tamper with certification concerning grade. It does not mention "type."

(e) 511i (m). This section provides for cooperation with the Secretary and any State. If absolute preemption, which is the thread of the majority opinion, was the result of the Act, the Secretary would need no power to cooperate but would be, as is contended and to this point upheld, all powerful.

Those sections demonstrate beyond question that there is no **intent** on the part of Congress to preempt relative to "type," most especially in the field of generic identification as opposed to identification according to quality (grades).

Thus, to support the majority opinion, preemption must be said to result from regulations of the Secretary wherein he prescribes by regulation (although not followed by practice) that classification by type shall be placed on the inspection certification (7 C. F. C., §§ 29.80, 29.1144). In the first instance, Section 511g shows any such regula-

tion to be beyond the scope of the Secretary's power. In the second instance, the Secretary himself, according to the record in this case, does not adhere to that regulation. And in the third and most important place, we know of no rule under which the **intent of Congress** can be demonstrated by regulation of the Executive Branch, particularly where the Executive Branch itself does not adhere to wn regulation.

e are driven thus to the conclusion based upon the words emphasized in the course of the opinion, e. g., "Regardless of any factors of historical or geographic nature"; "principally"; and on the concluding sentence of the next to last paragraph: "Tobacco is includable in Type 14 regardless as to where it has been grown, provided it meets the specifications of that type," that the Court finds the Georgia definition to be in **conflict.** If this be the case, we could not quarrel with the opinion provided the Court did demonstrate how there can be conflict in the face of the stipulation and in the face of the official publication which demonstrates "type" and which was issued pursuant to Section 511c of the Act (Stipulation 4 and Defendant's Exhibit 1).

If then we do not have a congressional expression of preemption, a congressional intent of preemption, or conflict, do we have a new rule of law that congressional action in the field mechanically precludes State action? If this be the new rule, that congressional intent—clear—manifest, be no longer the test, the States, with reference to agricultural products alone will have stripped from their power to regulate relative to most all of its products, regardless of its importance.

If this opinion is permitted to stand with the announcement and adoption of the mechanical rule, what will be the status of state legislation and regulation as to:

Apples, in view of, 28 U. S. C. A. 20-23;
Filled Milk, in view of, 28 U. S. C. A., Ch. 3;

Animals, Meat and Meat Products, in view of, 28 U. S. C. A., Ch. 4;
Diseased Animals, in view of, 28 U. S. C. A. 104;
Animal Remedies, in view of, 28 U. S. C. A., Ch. 5;
Foods and Drugs, in view of, 28 U. S. C. A., Ch. 9;
Poultry and Poultry Products Inspection, in view of, 28 U. S. C. A., Ch. 10;
Cotton Standards, in view of, 7 U. S. C. A., Ch. 2;
Grain Standards, in view of, 7 U. S. C. A., Ch. 3;
Naval Stores, in view of, 7 U. S. C. A., Ch. 4;
Seed, in view of, 7 U. S. C. A., Ch. 5;
Insecticides, in view of, 7 U. S. C. A., Ch. 7;
Dealing in Livestock, in view of, 7 U. S. C. A., Ch. 9;
Warehouses, in view of, 7 U. S. C. A., Ch. 10;

and throughout the 40 chapters enumerated in Title 7, U. S. C. A., and every instance where there is Federal and State legislation concerning a commodity or business?

Is this Court, by this decision, saying that federal action must specifically and unequivocally state by Congress, that the several states are permitted to act? If this be so, do we not have a radical departure from adherence to the time-honored rule of permitting and upholding the right of the state to exercise its police power whenever possible?

More importantly, the Congress of the United States needs to know if its action in a field, absent an expression to the contrary, precludes state action, for certainly the collective desires of the Representatives and Senators to protect the products of their own respective states would evidence itself in continuous expressions that United States Grade A eggs will not preclude eggs from being called United States Grade A Iowa eggs or United States No. 1 California oranges or United States No. 1 Idaho potatoes.

Finally, the majority opinion concludes:

> "Under the definition of types or grades of tobacco **and the labeling** which the Federal government has adopted, complementary State regulation is as fatal as State regulations which conflict with the Federal scheme." (Emphasis supplied.)

The only "complementary State regulation" is labeling as to "type." The Federal government (Sec. 511g) demonstrates the absence of any requirement of any "labeling" by the Federal government in any area save as to **grade**. Since Georgia does not label as to grade, the necessary requisite for the Court's majority opinion as to preemption is missing.

The extent of State action in this case is emphasized by the Georgia Tobacco Inspection Act in two instances. Section 1 provides:

> "Section 1. It is the intent and purpose of this Act to enable producers to have sufficient time to properly cure, prepare and have an adequate time to market their flue-cured tobacco in an orderly manner and to provide a means of identification of types of flue-cured leaf tobacco sold in this State to the end that all purchasers thereof may be assured of the positive identification of tobacco sold in this State. It is found by the General Assembly that it is essential that the provisions provided in this Act are necessary to the proper marketing and identification of flue-cured leaf tobacco. . . ."

Section 13, after providing the means of identification, provides:

> "(E) It is the intent and purpose of this section to provide a means to positively identify type 14 tobacco and to require that types other than type 14 be identified and marketed in such manner as to in-

dicate the type to any person seeking to ascertain the type of tobacco offered for sale in this State."

A mere reading of the quoted provisions of the Georgia Act is enlightening.

3. Even if 1 and 2 are without substance, appellants require a clarification and limitation of the judgment below which is affirmed by order of this court.

If this opinion is permitted to stand by an unconditional affirmance of the judgment of the lower Court, the Commissioner of Agriculture of the State of Georgia, in the field of identification and relative to markets covered by the Federal Inspection Act, would be absolutely prohibited from attempting to exercise the police power of this State to guarantee to the purchasers of tobacco that the products that they were seeking are correctly and properly identified. If this opinion is permitted to stand, the Commissioner of Agriculture could not ask the legislature for additional legislation, outside typing, to require the proper identification of the origin of tobacco. This clarification is not important relative to tobacco alone, but this injunction in its present form goes to the natural right of any State or locale having a product of which it is proud to be able to enhance the product in the market place by requiring that those who deal therein do so with full disclosure; that those who purchase may purchase with full confidence that the desirable product which they sought is that which they purchased and, whether it be California oranges, Idaho potatoes or Georgia tobacco, when it is important to the economies of that State, that State has the right to exercise the full force of its police power to require that it be identified that it meet the standards of the State in order to bear the label of the State. Whether that identification be in terms of white or blue or other tag, ready identification as to the

source is demonstrated by this record to be absolutely essential to the welfare of the producers of tobacco in this State.

We respectfully request therefore that this Court, even if it refuses the Motion for Rehearing advanced above, direct that the judgment of the lower Court be modified so that the Commissioner of Agriculture of the State of Georgia is enjoined only from classifying tobacco as to "type" or grade and is permitted to identify in such manner as he may prescribe by lawful regulation so long as that identification does not tend to establish a contrary "official standard" from that established pursuant to the Federal Tobacco Inspection Act.

Respectfully submitted,

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EUGENE COOK,
The Attorney General,

Office and Post Office
Address:
State Judicial Building,
Atlanta 3, Georgia.

.....

G. HUGHEL HARRISON,
Assistant Attorney General,

State Judicial Building,
Atlanta 3, Georgia.

.....

GORDON KNOX,
Deputy Assistant Attorney General,

Hazlehurst, Georgia.

.....

FRANK S. TWITTY,
Deputy Assistant Attorney General,

Camilla, Georgia.

.....

CHRIS B. CONYERS,
Deputy Assistant Attorney General,
Counsel for Phil Campbell, Commissioner of Agriculture of the State of Georgia,

First National Bank of
Brunswick Building,
Brunswick, Georgia.

.....

DENMARK GROOVER, JR.,
Attorney at Law,
Counsel for Intervenor, Georgia Farm Bureau Federation,
Appellants.

710 Walnut Street Building,
Macon, Georgia.

Certificate of Counsel.

I hereby certify that the foregoing Motion for Rehearing is presented in good faith and not for delay.

.....

G. Hughel Harrison,
Assistant Attorney General,
Of Counsel for Appellants.